A

ROSLAN SABU

v.

PP

B

COURT OF APPEAL, PUTRAJAYA
DENIS ONG JCA
MOHD GHAZALI YUSSOF JCA
JAMES FOONG JCA
[CRIMINAL APPEAL NO: R-05-89-2003]

C

16 MARCH 2006

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in 1346.6 grams of cannabis - Accused running away and throwing two transparent bags containing cannabis - Custody and control*

D

- Knowledge - Whether proved - Whether raising presumption of trafficking - Dangerous Drugs Act 1952, ss. 37(da), 39B(1)(a)

The appellant, who was carrying two transparent plastic bags, threw the bags into the bushes when asked by two policemen as to what he was carrying. He also ran away when asked to stop. The two bags were recovered and found to contain 1346.6 grams of cannabis, whence forth the appellant was charged with trafficking in the illicit drugs under s. 39B(1)(a) Dangerous Drugs Act 1952 ('the Act'). Having ruled that the accused had custody and control of the drugs, the learned trial judge held that the conduct of the accused also showed that he had knowledge of the contents of the bags. The learned judge hence invoked the presumption (of trafficking) in s. 37(da) of the Act and, upon the appellant's failure rebut the same, convicted and sentenced him to death. The appellant appealed and argued that the finding as to knowledge was flawed as – upon the authority *inter alia* of the Federal Court in *PP v. Tan Tatt Eek* [2005] 4 CLJ 460 and the Court of Appeal in *Taib Mohamad v. PP* [2002] 3 CLJ 680 – his throwing away of the two plastic bags and running away did not necessarily imply knowledge of the contents of the bags.

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Held (dismissing the appeal):
Per James Foong JCA delivering the judgment of the court

(1) The principles of law deduced from the authorities cited are as follows. The mere act of throwing away a container or bag that was later found to contain illicit drug does not necessarily imply that the accused has knowledge of what is contained therein. There must be direct proof or inference

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that the accused knew that what he was carrying was illicit drug. Further, the mere fact that the accused took flight and threw away the bag containing the drug is insufficient by itself to infer knowledge. To successfully infer knowledge in such a situation there must be only one exclusive inference to the fact to the exclusion of other possibilities. (para 11)

(2) The evidence presented pointed out to only one inference, *ie*, that the appellant knew that what he was carrying in the two plastic bags were illicit drugs. The appellant could not have missed the glaring sight of the drugs since the plastic used to wrap them were transparent, and so were the two carrier bags. The appellant must have seen what he was carrying and this was sufficient to satisfy the *mens rea* element of the appellant on possession. This fact, considered together with the throwing away of the two bags and his running off after the police had ordered him to stop, could only lead to one inference, namely, that the appellant knew that what he was carrying were illicit drugs. (para 12)

(2a) The factual matrix here is quite unlike those in *PP v. Tan Tatt Eek* where the plastic bag is orange in colour and in *Taib Muhamad v. PP* where the plastic bag containing the drugs was not only black but the drugs were also wrapped in brown tapes. It was thus that in those cases, the accused were given the benefit of the doubt that they had no knowledge of what they were carrying. (para 12)

Bahasa Malaysia *translation of headnotes*

Perayu, yang membawa dua beg plastik lutsinar, telah mencampak beg ke dalam semak apabila ditanya oleh dua anggota polis akan apa yang dibawanya. Perayu juga melarikan diri apabila diminta supaya jangan lari. Kedua-dua beg telah dijumpai dan didapati mengandungi 1346.6 gram ganja, yang berakibat perayu dituduh mengedar dadah terlarang tersebut di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta'). Setelah mendapati bahawa perayu mempunyai jagaan dan kawalan ke atas dadah, yang arif hakim bicara juga merumuskan bahawa tingkah laku perayu menunjukkan bahawa beliau juga mempunyai pengetahuan tentang kandungan kedua-dua beg. Yang arif hakim, dengan itu, telah menggunapakai anggapan (mengedar) s. 37(da) Akta, sekaligus mensabitkan perayu dan menjatuhkan hukuman mati ke atasnya. Perayu merayu dan berhujah bahawa dapatan mengenai pengetahuan cacat oleh kerana – berdasarkan antara lain autoriti

Mahkamah Persekutuan dalam *PP v. Tan Tatt Eek* [2005] 4 CLJ 460 dan Mahkamah Rayuan dalam *Taib Muhamad v. PP* [2002] 3 CLJ 680 – perbuatannya mencampakkan beg plastik dan melarikan diri tidak semestinya membangkitkan andaian pengetahuan tentang kandungan beg-beg tersebut.

Diputuskan (menolak rayuan)
Oleh James Foong HMR menyampaikan penghakiman mahkamah:

(1) Prinsip undang-undang yang boleh dirumus dari autoriti-autoriti yang dikemukakan adalah seperti berikut. Andaian pengetahuan tentang kandungan sesuatu bag atau kantung tidak boleh dibuat semata-semata kerana tertuduh telah membuang beg atau kantung yang kemudian didapati mengandungi dadah terlarang. Harus wujud keterangan atau andaian nyata bahawa tertuduh tahu bahawa apa yang dibawanya adalah dadah terlarang. Selain itu, fakta semata-mata bahawa tertuduh melarikan diri dan membuang beg yang mengandungi dadah, secara bersendirian, adalah tidak mencukupi untuk membangkitkan andaian pengetahuan. Bagi membangkit andaian pengetahuan dalam keadaan sedemikian, harus wujud hanya satu sahaja andaian terhadap fakta, tanpa sebarang kemungkinan-kemungkinan lain.

(2) Keterangan yang dikemukakan menunjuk kepada hanya satu andaian sahaja, iaitu, bahawa perayu tahu bahawa apa yang dibawanya di dalam kedua-dua beg adalah dadah terlarang. Adalah tidak mungkin bahawa dadah tersebut terselindung kepada perayu oleh kerana plastik yang digunakan untuk membalutinya adalah lutsinar, sepertimana halnya dengan kedua-dua beg. Perayu semestinya melihat apa yang dibawanya dan itu sudah memadai untuk memenuhi elemen *mens rea* perayu berkaitan milikan. Fakta ini, ditambah dengan perbuatannya membuang kedua-dua beg dan melarikan diri walaupun dilarang berbuat demikian, menjurus hanya kepada satu andaian, iaitu bahawa perayu mengetahui bahawa apa yang dibawanya adalah dadah terlarang.

(2a) Acuan fakta di sini adalah berbeza dari apa yang berlaku dalam *PP v. Tan Tatt Eek* di mana beg plastiknya berwarna oren dan dalam *Taib Muhamad v. PP* di mana beg plastik yang mengandungi dadah bukan sahaja berwarna hitam tetapi dadahnya pula dibungkus dengan pita berwarna coklat. Itulah

sebabnya maka tertuduh di dalam kes-kes tersebut telah diberi manfaat keraguan munasabah bahawa mereka tidak mempunyai pengetahuan tentang apa yang mereka bawa.

Case(s) referred to:
PP v. Tan Tatt Eek [2005] 4 CLJ 460 FC ***(refd)***
Reza Mohd Shah Ahmad Shah v. PP [2005] 4 CLJ 581 CA ***(refd)***
Taib Mohamad v. PP [2002] 3 CLJ 680 CA ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1957, s. 37(da)(vi)

Other source(s) referred to:
Prof Glanville Williams, *Textbook on Criminal Law*, p 125

For the appellant - Ravindran V Muthu (Jayabalan Nadarajan with him); M/s VM Ravi & Assoc
For the respondent - Meor Hashimi Abdul Hamid

Reported by WA Sharif

JUDGMENT

James Foong JCA:

Introduction

[1] The appellant was charged as follows:

> Bahawa kamu pada 4.2.1998 jam lebih kurang 5.40 petang di pagar keselamatan berhampiran pintu TS 9/50, di dalam Daerah Kangar, di dalam Negeri Perlis, telah mengedar dadah berbahaya iaitu 1346.6 gram cannabis dan oleh yang demikian kamu telah melakukan suatu kesalahan di bawah Seksyen 39B(l)(a) Akta Dadah Berbahaya 1952 (Disemak 1980) dan boleh dihukum di bawah Seksyen 39B(2) Akta yang sama.

[2] He was found guilty as charged by the High Court at Kangar and was sentenced to death. He appealed to us. After hearing submissions from his counsel and that of the deputy prosecutor, we unanimously dismissed his appeal. Below are our grounds.

Facts

[3] On 4 February 1998, at about 5.40pm, two police officers, SP5 and SP6, were patrolling on a motor cycle at a location known as Pos TS 10 Malaysian-Thai border near Padang Besar, Perlis. When they were close to gate TS 9/50 they came across

A the appellant who was carrying two transparent plastic bags, one in each hand. He was coming out from some bushes and walking towards the road. SP5 called out to him in a loud voice: "Hai Mat, apa yang kamu buat di sana?"

B **[4]** Upon hearing this, the accused ran back to where he came from. On seeing this, SP5 shouted, "jangan lari kami polis" and got down from the motor cycle to give chase. In the course of escaping, SP5 and SP6 saw the appellant threw away the two plastic bags that he was carrying into the bushes. The appellant C was apprehended and the two plastic bags retrieved by SP6. Inside each bag was a package of drugs wrapped in transparent plastic. The appellant was arrested and the drugs when later examined by the chemist from the Chemistry Department were found to be cannabis weighing 1346.6 grams.

D **Issue Raised During Appeal**

[5] Though there are 12 grounds listed in the appellant's petition of appeal, his leading counsel, Mr. Ravindran, informed us that the appellant would be relying only on ground number 6; the E rest would be abandoned.

[6] Ground 6 in his petition of appeal reads:

> Yang Arif Hakim terkhilaf dari segi undang-undang dan fakta apabila memutuskan bahawa elemen minda pemilikan telah berjaya F dibuktikan berdasarkan keterangan SP5 bahawa Perayu telah mencampakkan kedua-dua bungkusan tersebut semasa disergah dan cuba melarikan diri dan disamping itu plastik yang membaluti bahan tumbuhan tersebut adalah plastik lutsinar dan berwarna cerah.

G **[7]** To support this contention, Mr. Ravindran first highlighted to us the relevant passage in the trial judge's grounds of judgment where he claimed to contain the erroneous finding by the trial judge on the appellant's, knowledge of the illicit drugs in the 2 plastic bags. This is at p. 130 of the appeal record (p. 11 of the H alasan penghakiman) which reads:

> Dari segi fizikal saya berpuashati berdasarkan keterangan SP5 bahawa kedua-dua bungkusan tersebut berada dalam tangan Tertuduh dan pada masa tersebut hanya Tertuduh seorang sahaja berada di situ. Jelaslah bahawa kedua-dua bungkusan tersebut I berada dalam kawalan atau jagaan Tertuduh. Mengenai elemen minda atau pengetahuan pula saya berpuashati bahawa Pihak Pendakwaan telah berjaya membuktikan Tertuduh mengetahui

kandungan bungkusan tersebut. Ini berdasarkan keterangan SP5 bahawa Tertuduh telah mencampak kedua-dua bungkusan tersebut semasa disergah oleh SP5 dan cuba melarikan diri. Di samping itu plastik yang membaluti bahan tumbuhan tersebut adalah plastik lutsinar dan berwarna cerah. Keterangan saksi-saksi Pihak Pendakwa jelas menunjukkan bahan tumbuhan dalam bungkusan plastik itu boleh dilihat dengan mata kasar. Keadaan ini juga boleh dilihat sendiri oleh Mahkamah dalam gambar yang dikemukakan oleh Pihak Pendakwaan iaitu P6A-F.

[8] According to Mr. Ravindran, this finding is contrary to the principle laid down in the recent Federal Court case of *PP v. Tan Tatt Eek* [2005] 4 CLJ 460 which says:

In this case, the respondent was seen and found to be carrying the orange plastic bag in his right hand and having dropped the bag he reacted with shock when he was arrested by the police. The learned trial judge held that the respondent had physical custody and control of the bag, and we see that he was right in coming to that conclusion. However, he went further to find by inference from the respondent's conduct and appearance that the respondent had knowledge of the drugs in the bag. To our minds, such a finding was not justified on the evidence before him.

The factum of the respondent having dropped the bag and displayed reaction of shock can be facts upon which the prosecution can invite the trial court to infer guilt on part of the respondent over the presence of the drugs in the bag. But such conduct is equally consistent with an innocent man who is in a state of pure panic reacts in that way (see *Abdullah Zawawi bin Yusoff v. Public Prosecutor* [1993] 4 CLJ 1). On the conduct of the respondent, the learned trial judge at p. 133 of the appeal record jilid II had this to say:

> The accused was clearly caught by surprise. To my mind the reaction of shock and the dropping of the bag exhibited by a person caught by surprise does not unequivocally show guilt. It could equally be the reaction of an innocent but surprised person. No firm inference can be drawn on the basis of such insufficient evident.

So, how much support do the facts of dropping and being in a state of shock lend the appellant in his submission that the court should infer from them the fact that the respondent had knowledge of the drugs? In *Tai Chai Keh v. Public Prosecutor* [1948-49] MLJ Supp 105 at p. 108 Spenser Wilkinson J said:

> ... where there is more than one inference which can reasonably be drawn from a set of facts in a criminal case, we are of opinion that the inference most favourable to the accused should be adopted.

A Thus, it is clear from the above said passage that what is required is that in order for the prosecution to ask the court to draw any inference, it must provide the court with clear evidence of a set of facts which leave no other possible alternative inference which can reasonably be drawn. In the absence of such evidence, the
B court cannot but hold that there are other inferences possible in the circumstances. Hence, the facts of 'dropping and being in a state of shock' without more cannot constitute knowledge of the contents of the bag. There is simply insufficient evidence to support the inference of knowledge in the present case.

C **[9]** To fortify his claim that the act of throwing away the two plastic bags as well as running off when told to stop by the police do not necessarily imply that the appellant has knowledge of the contents therein, Mr. Ravindran highlighted two more cases decided by this court. The first is *Reza Mohd Shah Ahmad Shah v.*
D *PP* [2005] 4 CLJ 581 where Kadir Sulaiman JCA (as he then was) declared:

The appellant's action in running away when confronted, and at the same time throwing away the plastic bag can be inferred that the appellant had the knowledge that the plastic bag contained the
E dangerous drug. By running away it shows that the appellant had the knowledge in regard to the drug in the plastic bag. By throwing away the plastic bag, the appellant wanted to part with possession of the drug.

F But in our view, just because the appellant took flight and threw the plastic bag containing dangerous drug does not point to one and only conclusion that he knew what he was carrying was the dangerous drug, cannabis. In the circumstances, other inferences can be made such as that he did so because he may be carrying any other prohibited goods other than cannabis or that he was
G panicky and therefore chose to run away and throw out the bag he was carrying more so, in this case, when the police who confronted him were not in uniform. In *Toh Su Kuan v. PP* [2005] 3 CLJ 740 where the circumstances were very much stronger against the accused in that case than those in the present case but this court held that they were insufficient to constitute proof
H possession of the very drug stipulated in the charge. The accused in that case was charged with the capital offence of trafficking in 1,584.93 grammes of heroin and was sentenced to death in the High Court. The evidence for the prosecution was that the drug was found in 356 packets in different parts of the accused's
I person: 62 packets in the left shoe, 60 packets in the right shoe, 57 packets strapped to the left shin, another 57 packets strapped to the right shin, 60 packets tied to the waist in front and 60 packets fastened to the waist at the back ...

By the operation of our Dangerous Drugs Act 1952, in relation to the charge, it is necessary for the prosecution to prove directly or inferentially that the appellant had the knowledge of the nature of the dangerous drug he was carrying in the plastic bag. Knowledge in a person is a thing which cannot be seen or perceived. It can be deduced only from the overt act or conduct short of his own admission. The legislature in its wisdom, realizing the difficulty of establishing by direct evidence of this fact of knowledge, introduced a statutory presumption which is rebuttable, by way of s. 37(d) of the Act.

[10] The second authority is *Taib Mohamad v. PP* [2002] 3 CLJ 680 where K.C Vohrah JCA has this to say:

the mere throwing of the bag without more cannot constitute knowledge of the contents of the bag. To our mind his throwing of the bag, even if true, does not unequivocally show guilt bearing in mind what was stated in *Abdullah Zawawi bin Yusof v. PP* [1993] 4 CLJ 1 by the Supreme Court:

> The conduct of the appellant in running away when the discovery of the drugs was announced was consistent with his having known of the presence of the drugs in the box before their discovery, indicating thereby a sense of guilt. On the other hand it was conduct equally consistent with the appellant being in a state of panic. An innocent man faced with the prospect of arrest on a capital charge might foolishly act in that way.

There being no evidence from which his knowledge of the drugs could be inferred, the learned judge could not and should not have called the accused to make his defence on the charge of trafficking but the accused, because of the presumption of knowledge of the drug raised under s. 37(d) could be called upon his defence on a charge of possession of the cannabis.

[11] We are of the view that the principles of law deduced from the above authorities are these: The mere act of throwing away a container or bag that was later found to contain illicit drug does not necessarily imply that the accused has knowledge of what is contained therein. There must be direct proof or inference that the accused knew what he was carrying was illicit drug. Just because the accused took flight and threw away the bag containing the drug or the package of drug itself is insufficient to infer such knowledge. To successfully infer such knowledge in this kind of situation, there must only be one exclusive inference to this fact to the exclusion of other possibilities.

[12] Applying these principles to the facts of our instant case, we are firm in our conviction that, from the evidence as presented, there can be only one inference: the appellant knew what he was carrying in the two plastic bags were illicit drugs. The appellant could not have missed the glaring sight of the drugs since the plastic used to wrap them were transparent, and so were the two carrier bags. The appellant must have seen what he was carrying and this would be sufficient to satisfy the *mens rea* element of the appellant on possession. The factual matrix in this case is quite unlike those in *PP v. Tan Tatt Eek (supra)* where the plastic bag was orange in colour and in *Taib Mohamad v. PP (supra)* the plastic bag containing the drugs was not only black but the drugs were also wrapped with brown tapes. In those situations, we agree that there is a likelihood that the accused may not know the contents in the bag he was carrying because the strong colour of the bag or the wrapper may conceal the identity of the drug. For this reason, as gathered from the cases cited, the accused should be accorded the benefit of the doubt that he has no knowledge of what he was carrying. But in our case, the appellant could not have shut his eyes to what was obvious. The contents could be seen right through both the plastic bags and the plastic wrappers. They were so transparent that any reasonable person carrying them must have known what was inside. This is what Professor Glanville Williams in his text '*Textbook on Criminal Law*' at p. 125 called 'wilful blindness', when he said:

> ... the strict requirement of knowledge is qualified by the doctrine of wilful blindness. This is meant to deal with those whose philosophy is: 'Where ignorance is bliss, 'tis folly to be wise.' To argue away inconvenient truths is a human failing. If a person deliberately 'shuts his eyes' to the obvious, because he 'doesn't want to know,' he is taken to know.

[13] We are of the view that this considered together with the appellant's act of throwing away the two bags and running off after the police had ordered him to stop can lead to only one inference: that the appellant knew what he was carrying were illicit drugs. With this, we are in full agreement with the finding of the trial judge that the appellant had possession of the said drugs and presumed to be a trafficker by virtue of s. 37(da)(vi) Dangerous Drugs Act 1957, and when this presumption was not rebutted by the appellant, then the appellant must be guilty of the offence charged.

For these reasons we dismissed the appellant's appeal.